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N THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JACK COSTENBADER, as a Derivative Plaintiff etc., Plaintiff and Respondent, v. DONALD J. COSTENBADER et al., Defendants and Appellants.	A109918 (San Francisco County Super. Ct. No. CGC-02-411784)

I.

INTRODUCTION

This case arises out of the denouement of a family business. Appellants Donald J. Costenbader (Donald) and Vivian L. Costenbader (Vivian)[1], former corporate officers, directors, and majority shareholders of Jersey Constructors, Inc. (Jersey), appeal from a $738,362.33 judgment against them based on their breach of fiduciary duty, conversion, concealment and fraud. They maintain that the damages are excessive and that no substantial evidence supports certain of the trial court's findings. We affirm.

[1] Because the parties share the same last name, we refer to them by their first names, where appropriate, for clarity. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.) Vivian and Donald Costenbader are married, and Jack Costenbader is the father of Donald and John Costenbader, Jr. (John, Jr.).

II.

PROCEDURAL BACKGROUND

Respondent Jack Costenbader (Jack), a minority shareholder and officer of Jersey, brought the underlying derivative action on behalf of Jersey against Donald and Vivian for an accounting, declaratory relief, breach of fiduciary duty, conversion, concealment and fraud, and sought a preliminary injunction. The court granted a preliminary injunction on September 9, 2002, which, inter alia, enjoined Donald and Vivian from making personal expenditures of corporate funds and required them to return all Jersey-owned property.

Following a bench trial, the court issued its statement of decision and judgment against Donald and Vivian in the amount of $738,362.33. This sum included $315,362.33 for "personal non-corporate disbursements" of Jersey funds made to them, or on their behalf, plus statutory interest.

Donald and Vivian filed a motion to vacate the judgment under Code of Civil Procedure section 663, on the grounds that the legal basis for the decision was incorrect, erroneous, or not supported by the facts. The court denied the motion. This timely appeal from the judgment followed. (Cal. Rules of Court, rule 3(b).)

III.

FACTUAL BACKGROUND

Jersey was formed on December 10, 1996, as a construction company to bid on public works contracts in San Francisco. In order to qualify as a woman-owned business enterprise (WBE) and therefore receive preference in bidding on public works contracts, Vivian had majority control of Jersey, owning 51 percent of the stock. She also served as president, and, for a time, had sole check-signing authority. Donald served as vice-president of Jersey, and Jack was treasurer. Together, Donald and Vivian owned 60 percent of the Jersey stock. Jack and John Jr. were minority shareholders of Jersey, owning 30 percent and 10 percent, respectively. Jersey eventually was found not to qualify as a WBE.

In late spring or summer of 2000, Jack learned of a dispute with one of Jersey's subcontractors, Applied Remedial, regarding their performance of certain demolition work. Jack learned that "the executed subcontract that existed in our office was different than the noted subcontract that the subcontractor had as to the scope of work page." The copy of the subcontract in Jersey's files requiring Applied Remedial to perform a greater amount of work than the executed original required. Jack asked Donald about the differences, and Donald told him "he changed the pages or had the pages changed, substituted." Eula Loftin, the office manager[2], testified that, in her presence, Donald had "switched the page so as to eliminate the modifications made by the subcontractor" to the scope of work page of the contract. The parties do not dispute the trial court's finding that the fraud claims made against Jersey due to the subcontract dispute resulted in losses of "not less than $205,000.00 by [Jersey]."

In September 2000, Jack executed an indemnity agreement for additional bonding for Jersey with The Mountbatten Surety Company, Inc. (Mountbatten) under which he was an individual indemnitor, and his company, PCA, was a corporate indemnitor. On appeal, the parties do not dispute the court's finding in this regard: "On September 6, 2000, and while Jersey was near insolvency, [Donald and Vivian] intentionally, consciously, willfully and wrongfully induced Jack Costenbader to execute and deliver an indemnity agreement for additional bonding with Mountbatten Indemnity Company . . . and did conceal and suppress the true financial condition of Jersey at the time [Donald and Vivian] sought Jack Costenbader's guarantee . . . . [¶] [Donald and Vivian] knew and/or were aware that Jack Costenbader would not have provided such a guarantee if he were made aware of the true financial condition, losses, and the acts of ongoing conversion of [Jersey's] assets by Donald and Vivian . . . . [¶] Mountbatten . . . issued bonds, which bonding company was taken over by Zurich at a later time, and resulting financial losses of Jersey were covered as set forth herein in the sum of $160,000.00,

[2] Eula Loftin was the office manager and secretary of PCA Consulting Group, Inc. (PCA), a company headed by Jack. PCA shared office space with Jersey.

upon which Jack Costenbader was accordingly the prime guarantor." (Capitalization omitted.)

In approximately July 2001, Jack learned that Jersey's credit line at Bank of America had been exhausted and the corporation was unable to meet its financial obligations. The court found that Donald and Vivian had applied for an extension of this line of credit, and had "caused the name of [John, Jr.] to be placed upon an extension of credit" application without his knowledge or consent. Jack also began to question certain expenditures made by Donald and Vivian on the Jersey corporate credit cards, and reimbursements made by Jersey to them. An audit of those charges and reimbursements by expert David M. Chisholm disclosed numerous undisputedly personal charges[3], and many other charges which were undocumented or disputed as to the whether their purpose was business related. These charges totaled $230,232.23.[4]

Donald and Vivian testified that Jack approved or knew about all the personal charges, and had instructed them to make the charges through Jersey because they were "pre-tax dollars." Jack testified that he did not authorize Donald and Vivian to charge personal expenses to Jersey, or to reimburse themselves for personal expenses with Jersey funds.

In July 2002, the Carpenters Union sent Jersey an audit report, indicating that Jersey had underreported hours for carpenters and consequently "had not paid the proper union benefits . . . ." The union commenced a grievance proceeding, and the matter went to arbitration. The arbitrator found Jersey liable in the amount of $58,285.98. The parties do not dispute the trial court's finding that "[Donald and Vivian] intentionally underreported and thus falsified the payroll reports [to the Union] in violation of both public works contract requirements and the Union contract, underreporting payroll in

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[3] These included a swimming pool installed at Donald and Vivian's home, vacations, and purchases made at the Disney Store, Victoria's Secret, and Jamaica Me Hot Beauty Spa.

[4] Exhibit 99, prepared by Chisholm, indicated the personal charges totaled $230,332.23. Chisholm testified that the total personal expenditures on Exhibit 99

order to retain monies within [Jersey] and to obtain money for their ongoing use and benefit."

IV.

DISCUSSION

A. Excessive Damages

Donald and Vivian maintain that the damages awarded by the trial court were excessive in two respects. They argue that the award of $58,000 based on their intentional underreporting of payroll to the Carpenters Union constituted a double recovery, because the court also awarded damages for their use of corporate credit cards for personal expenses. They also claim that the court awarded Jack more damages than were incurred in regard to his execution of an indemnity agreement for bonding with Mountbatten Surety Company.

At the outset, we note that Donald and Vivian did not move for a new trial on the grounds of excessive damages.[5] " 'The point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on [a] motion for new trial.' " (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918, fn. omitted; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) § 8:278, pp. 8-156—8-157 (rev. #1, 2005).) "[T]he trial court is in a far better position than the Court of Appeal to evaluate the amount of damages awarded in light of the evidence presented at trial. . . . [¶] 'When defendants first challenge the damage award on appeal, without a motion for new trial, they unnecessarily burden the appellate courts with issues which can and should be resolved at the trial level. [Fn. omitted.]' . . ." (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121, citing *Schroeder v. Auto Driveaway Co., supra,* 11 Cal.3d at p. 919.)

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constituted "the figure of $230,232.23." That figure was apparently misspoken in the testimony.

[5] Donald and Vivian have not filed a reply brief, and consequently have not addressed this issue raised in respondent's brief.

Donald and Vivian instead filed a motion to vacate the judgment on the grounds that there was an "[i]ncorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts . . . ." (Code Civ. Proc., § 663, subd. 1.) The court denied the motion. Section 663 "provides a remedy when the trial court draws an incorrect legal conclusion or renders an erroneous judgment upon the facts as found by the court or as found by the jury in a special verdict. . . . [When] the trial court's judgment for defendant was consistent with and fully supported by the jury's special verdict . . . [t]he special verdict itself cannot be attacked under Code of Civil Procedure section 663. . . . Instead, the remedy is a motion for new trial. . . ." (*Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 479-480, fn. 7.)

Even had Donald and Vivian preserved their claims of excessive damages, they are meritless. They claim the damages awarded were excessive because the evidence did not support the amounts awarded. In considering this claim, we "must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

Donald and Vivian first assert that the $58,000 in damages due to their falsification of payroll reports constituted a "double recovery." They do not dispute that their falsification resulted in $58,000 in damages to Jersey. Instead, they argue that because the court found that they underreported the payroll "in order to retain monies within [Jersey] and to obtain money for their ongoing use and benefit" the award of $58,000 duplicated some of the damages awarded for use of corporate funds for personal expenses. Whatever the motive for the intentional underreporting of payroll, it resulted in an arbitration award against Jersey of more than $58,000. This liability was separate from their improper personal expenses charged to Jersey as found by the trial court. Consequently, the judgment requiring Donald and Vivian to repay Jersey the amount of liability caused by their underreporting of payroll did not result in a double recovery.

Likewise, the record does not support Donald and Vivian's contention that Jack received a "windfall" based on the Mountbatten bond issue. Jack was a personal indemnitor, and PCA was a corporate indemnitor, of a bond issued by Mountbatten. Donald and Vivian maintain that Jack testified the amount for which he was liable under the bond had been reduced by an offset totaling $134,000.
Therefore, the offset amount of $134,000 should have been subtracted from the $160,000 indemnity damages found, resulting in a total damage amount of only $26,000.

In support of their contention, Donald and Vivian point to a portion of Jack's testimony regarding a demand letter he had received from the attorneys representing Mountbatten. In that letter, the surety company sought reimbursement for $161,577.07 in losses and $8,109.42 in fees and expenses paid based on Jersey's default.[6] The letter also indicated that Jersey had assigned its rights to a total of $132,882 in contract and retention funds to the surety company. Jack testified at trial that the assignment actually totaled $134,000, and he was then asked if "[t]hose numbers and those amounts were to offset the amounts that were being claimed by [the surety]?" Jack responded affirmatively. Donald and Vivian conclude from this that the total losses and expenses of $160,000 should have been reduced by $134,000. Thus, they argue that this demonstrates a lack of evidence supporting the court's award of $160,000 relating to the Mountbatten issue.

Donald and Vivian fail to note, however, that the total amount claimed by the surety in the letter was not only the $161,577.07 in losses and $8,109.42 in fees and expenses. The surety also confirmed the parties' agreement that it was "issuing a warranty bond for the Presidio & Potrero Trolley Coach Facilities project "pursuant to Jersey's assignment of its rights" of the $132,882, and that it would seek additional reimbursement for the bond premium if necessary. One reasonable interpretation of this evidence is that the $132,882 sum was used as payment for the surety's issuance of the Presidio & Potrero Trolley Coach Facilities project warranty bond, and thus, was not available to offset the $169,686.49 in losses, fees and expenses. Jack testified, moreover,

[6] Apparently, the trial court reduced this total damage sum to $160,000.

that ultimately he, Jersey, and PCA were liable for the full amount of liability paid by the surety, in the amount of $161,577. Therefore, we cannot say that the trial court found excessive damages on this issue, or that the finding lacked substantial evidentiary support.

B. Substantial Evidence Supporting the Trial Court's Findings

Donald and Vivian argue that two of the trial court's findings are not supported by substantial evidence. First, they claim that there is no substantial evidence that Donald forged the "scope of work" page of the Applied Remedial subcontract. Second, they urge that there is no substantial evidence supporting the trial court's finding that they charged certain personal expenses on the company credit card.

When a judgment is attacked on the ground that there is no substantial evidence to sustain it, "[o]ur authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, *in support of the judgment*." (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at pp. 630-631, italics added.) The testimony of a single witness may constitute substantial evidence in support of the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences or deductions in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. [Citations.]" (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at pp. 630-631.) Even uncontradicted testimony in appellant's favor "does not necessarily conclusively establish the pertinent factual matter: The trier of fact is free to reject any witness's uncontradicted testimony; and the court of appeal will affirm so long as the rejection was not arbitrary. [Citations.]" (Eisenberg et al., Civil Appeals and Writs, *supra*, § 8:54, pp. 8-21—8-22.) We view all factual matters in the light most favorable to the prevailing party, resolving

all conflicts and indulging all reasonable inferences from the evidence to support the judgment. (*Bickel v. City of Piedmon*t (1997) 16 Cal.4th 1040, 1053, abrogated with regard to construction of the Permit Streamlining Act, as noted in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.)

1. Forgery of the "Scope of Work" Page

As to the claim that Donald falsified the scope of work page on Jersey's subcontract with Applied Remedial, the trial court made the following findings: "[Donald and Vivian] willfully and intentionally falsified the scope of work page of the Jersey sub-contract with Applied Remedial by expanding the scope of work description imposed upon Applied Remedial. Such intentional actions and falsifications thereof resulted in substantial fraud claims against [Jersey] by Applied Remedial and Amwest Surety (Hartford) that led to significant losses of not less than $205,000.00 by [Jersey]. [Donald and Vivian] knew and were aware that the scope of work page that was substituted was false, and wrongfully intended to have [Jersey], Applied Remedial, and Amwest rely upon the inaccurate and misleading scope of work page and knew or were aware that such actions were reasonably and/or substantially certain to cause injury and loss to [Jersey], its minority shareholders, and creditors upon discovery." (Capitalization omitted.)

Donald and Vivian's first cavil is that the evidence of Donald's falsification of the scope of work page was in conflict, and consequently not substantial. " 'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact.' " (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.) Here, though Donald testified that he did not falsify the scope of work page, Eula Loftin testified that he did. Jack also testified that Donald told him he had changed the scope of work page without providing the changed document to Applied Remedial. The trial court weighed the conflicting evidence, and observed Donald's testimony and demeanor

throughout the trial. The court had the legal prerogative to disbelieve Donald's testimony, which it obviously did on this issue.[7]

Next, Donald and Vivian argue that Eula Loftin's testimony did not constitute substantial evidence of Donald's falsification of the scope of work page, noting the discrepancies between her earlier declaration and her testimony at trial. Eula Loftin, however, read the following sentence from her earlier declaration and testified that it was true: "I was present in the office when in my presence, Don Costenbader physically removed the faxed page received from the subcontractor containing changes made to the scope of work page of the subcontract by the subcontractor and switched the page so as to eliminate the modifications made by the subcontractor in question. In short, the falsification of the document in question by Donald Costenbader occurred in my presence." She also testified about making a "typographical change" to the contract at Donald's request, which Donald and Vivian argue demonstrated that Donald had not falsified the scope of work page. Once again, however, the trial court made factual findings based on conflicting evidence after observing the witnesses testify. Substantial evidence supported the trial court's findings.

2. Personal Expenses Charged To Jersey

Donald and Vivian further assert that no substantial evidence supports the trial court's finding that they charged certain of their personal expenses to Jersey. They point to three charges, totaling $13,695.75, which they claim are unsupported by substantial evidence because there was conflicting evidence regarding whether the charges were business related.

The three contested charges were $1,274.99 to American Soils in San Rafael for engineered fill, a "dirt product," $5,345.25 paid to Compucom Systems for a laptop computer, and $7,075.51 to Meridian Project Systems for "project management software." Donald testified that these three charges were business related.

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[7] Even our reading of the cold transcript readily reveals Donald's evasiveness and a questionable lack of recollection about his actions relating to Jersey.

In opposition, David M. Chisholm testified as an expert in bookkeeping and tracing company expenditures. He reviewed the Jersey credit card bills from American Express, Capital One, Advanta, and Bank of America for the period from 1999 through mid-2001. He also reviewed Jersey's financial records, Donald's and Vivian's personal income tax returns, and their deposition transcripts and exhibits.

Chisholm testified that he classified the American Soils charge as personal because there was no receipt, "there [was] no notation on the bill itself that it was used for business or a job number or anything like that," Donald and Vivian lived in the North Bay, and they were doing reconstruction on their home. Chisholm considered the $5,345.25 paid to Compucom Systems for a laptop computer to be a personal expense because "[i]t wasn't added to the assets of the company and there is no receipt." He explained that "when a corporation . . . buys any particular equipment or anything worth a specific dollar amount this large, it is added to the assets of the company, number one, to improve their books; number two, you have depreciation as a write-off." Chisholm also testified that the $7,075.51 paid to Meridian Project Systems was for a personal expense, because there was no receipt and it was not added to Jersey's assets.

Also, Jack testified that it was his belief that the laptop was "of a business nature that should have been returned to the corporation." Because the laptop purchase was not returned to the corporation, Don and Vivian must have thought it was a personal charge. It is uncontroverted that they did not return the laptop to Jersey.

Once again, the trial court was fully justified in resolving conflicts in the evidence against Don and Vivian. Therefore, their claim that no substantial evidence supports the court's decision is meritless.

V.

DISPOSITION

The judgment is affirmed. Jack is to recover his costs on appeal.

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Ruvolo, P.J.

We concur:

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Sepulveda, J.

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Rivera, J.